

No. 08-17094, 08-17115

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JESUS M. GONZALEZ, *et al.*,
Plaintiffs-Appellants,

v.

STATE OF ARIZONA, *et al.*,
Defendants-Appellees.

On appeal from the United States
District Court for the District of
Arizona

No. CV-06-01268-PHX-ROS
No. CV-06-01362-PHX-ROS

**ANSWERING BRIEF IN APPEAL NO. 08-17094
OF TWELVE COUNTY DEFENDANTS-APPELLEES¹**

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JURISDICTIONAL STATEMENT

Twelve County Defendants-Appellees (hereinafter “Twelve Counties”) agree with Plaintiffs’ Statement of Jurisdiction as set forth in their opening brief.

STATEMENT OF THE CASE

Twelve Counties have reviewed the State Defendants-Appellees’ (hereinafter “State”) Answering Briefs in the present appeal (no. 08-17094) and in the consolidated appeal (no. 08-17115) (“ITCA appeal”) and fully join in the State’s Answering Briefs.² Twelve Counties incorporate the State’s Answering Briefs by this reference as if fully stated herein. In addition, the Twelve Counties submit the following arguments to the Court, insofar as they relate directly to these Defendants.

When Plaintiffs filed this action on May 9, 2006, in the District of Arizona, they named, in addition to the State Defendants, the then-duly elected and appointed County Recorders and Elections Directors of each County of the State in their official capacity. This Brief is submitted on behalf of the now-duly elected and appointed County Recorders and Elections Directors of Maricopa, Apache, Cochise, Gila, Graham, Greenlee, La Paz, Mohave, Pima, Santa Cruz, Yavapai, and Yuma Counties.

² Twelve Counties note that they are not named parties in the ITCA case or appeal. However, many of the State’s arguments presented therein are equally applicable to the present appeal. To that extent, the Twelve Counties incorporate the State’s Answering Brief in the ITCA appeal.

STATEMENT OF FACTS

A. Arizona Voting History Prior to Proposition 200.

The ideal that every vote counts is not theoretical in Arizona. Arizona has a history of close elections, thereby triggering automatic recounts of votes. In 1994 during the Democratic primary for United States Senate, Sam Coppersmith led Dick Mahoney by 99 votes (81,762 to 81,663) after the initial count.³ After the recount was complete, Sam Coppersmith ended up winning by 59 votes.⁴ In 1992, Richard Kyle and John Gaylord (now Judge Gaylord) tied after the initial tabulation in the Republican Primary for the Arizona House of Representatives in District 6.⁵ A tie still resulted after the recount, and the race was literally decided by a game of chance.⁶ Kyle and Gaylord agreed to play a single hand of poker and Kyle won with a pair of sevens.⁷ In 1994, a recount took place in the District 27 Republican Primary Election for the Arizona House of Representatives between Mike Gardner and John MacDonald.⁸ Mike Gardner kept his 32-vote lead over

³ District Court Docket (hereinafter DKT) # 804; Muhler, Bill. "Coppersmith Wins Recount by 59 Votes, "Landslide Sam" Now Ready for Kyle." The Arizona Republic. October 1, 1994. Page A1.

⁴ *Id.*

⁵ DKT. # 804; Padgett, Mike. "Winning Hand, Poker-Faced Candidates Decided Election With Turn Of The Cards." The Phoenix Gazette. September 30, 1992. Page B1.

⁶ *Id.*

⁷ *Id.*

⁸ DKT. # 804; Staff. "Vote Recount Settles District 27 GOP Primary." The Phoenix Gazette. September 29, 1994. Page B2.

MacDonald.⁹ In 1996, Sue Gerard led Jerry Harris by 32 votes after the initial tabulation in the Republican Party primary.¹⁰ Gerard won by 33 votes after the recount.¹¹

The most recent recount of a legislative race occurred in 2004, in the Republican Party Primary Election for the House of Representatives in District 20.¹² A recount was triggered in that race when the initial count yielded a four-vote margin between Anton Orlich and John McComish.¹³ Orlich finished second with 5,533 votes and McComish finished a close third with 5,529 votes.¹⁴ After the recount, McComish overtook Orlich to win by 13 votes.¹⁵ The final recount was McComish: 5,633; Orlich: 5,620.¹⁶ It has never been clearer than now in the State of Arizona, that every vote counts, and even a single improper vote dilutes the fundamental voting power of the citizens of Arizona.

⁹ *Id.*

¹⁰ DKT. # 804; Van Der Werf, Martin. "Gerard Ekes Out Victory in District 18 Race." The Arizona Republic. September 14, 1996. Page A1.

¹¹ *Id.*

¹² DKT. # 804; Kelley, Josh. "Count Gives Orlich 4-vote Lead Over McComish." The Arizona Republic. September 12, 2004. Page B5; Lindsey, Nedra. "District 20 Recount Reverses Order: McComish Tops Orlich." The Arizona Republic. September 22, 2004. Page B5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Serious questions were raised by the press and the candidates following the recount, which led the Secretary of State to issue the following report. http://www.azsos.gov/election/Brewer_Voting_Action_Plan/Election_Law_Advisory_Committee/Committee_Report_12-30-2005.pdf.

Further weighing on the State and Counties' interest in protecting the integrity of Arizona's elections, is the history of voter fraud that has plagued, not only Arizona, but other states as well. While the U.S. Supreme Court has upheld State actions to protect their elections, even in the absence of any instances of voter fraud, Arizona has experienced real instances of voter fraud in both the registration and voting processes. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1617, 1619 (2008) (recognizing states' interests in deterring and detecting voter fraud and promoting public confidence in the integrity of the electoral process, even in absence of any evidentiary showing of fraud in the state's electoral process.) Certainly, the full extent of real abuse occurring cannot be known without a system of detection, such as the one challenged here. The Government cannot possibly run down every instance of voter fraud or abuse after the fact and, as the Secretary of State's Representative, Joseph Kanefield, testified at trial, even in instances where subsequent detection and prosecution occurs, there is no process by which a fraudulent ballot can be retrieved and discounted once it has been cast.¹⁷ Thus, without the Proposition 200 requirements, there was no mechanism for preventing the dilution of legitimately cast votes. Requiring the voter to register with the proof of their citizenship and requiring them to provide identification when voting at the polls on election day is a far preferable and more

¹⁷ State's Supplemental Excerpt of Record (hereinafter "SER") at 83-84, Trial Transcript at 693:3-694:3.

cost effective method of insuring the integrity of the voting process, than requiring the Government to establish fraud after the fact.

Prior to the passage of Proposition 200, Arizona essentially relied on an honor system for registering to vote and voting at the polls. There were, however, parallel state and federal systems that assisted in identifying some instances of voter fraud. The effectiveness of these systems pale by comparison to the more effective requirement of the voter having to establish these bona fide requirements up front, but they do provide some insight into the fact that voter fraud is a real problem for Arizona that must be dealt with to insure the integrity of the system for all voters. For instance, the Maricopa County jury commissioner promptly notifies the Maricopa County Recorder of juror questionnaires that indicate the individuals are not United States citizens. A.R.S. §§16-101; 16-165(A). In 2007, the Maricopa County Elections Department documented the names of the individuals whose voter registrations were cancelled upon receiving the commissioner's notifications.¹⁸ During this time, there were 168 registrations cancelled because the registrants were non-citizens.¹⁹ In addition, since August 2003 the U.S. Citizenship and Immigration Services (USCIS) has requested information from the County regarding voter registration and voting history of individuals that have

¹⁸ SER at 192-193, 07-31-06 Deposition of K. Osborne at 15:23-16:23.

¹⁹ See *id.*

applied to become naturalized citizens.²⁰ The Maricopa County Elections Department has kept a record of the USCIS requests for this information.²¹ Of the one hundred individuals requesting such information, seventy-four of the individuals were registered to vote and twenty-five had voted in an election.²²

Furthermore, in her deposition, which was entered as evidence in the District Court trial, Maricopa County Elections Director Karen Osborne expressed her frustration with the voter registration organizations that have misled legal residents, who were not yet U.S. citizens, into registering to vote.²³ At trial, the District Court saw and heard some examples of the kind of misleading and erroneous information being cast by some of the Plaintiff organizations, whether intended or innocent, such as Chicanos Por La Causa through the testimony of their director.²⁴ Notwithstanding the stated intent of educating the public, in fact, the information being disseminated arguably does just the opposite, by actually deterring Hispanics from registering or voting.²⁵ Beyond this misinformation, the paid voter registration circulators are also known to have an incentive to use unfortunate and counterproductive tactics, in an effort to earn money for each

²⁰ *Id.* at 189-19, 07-31-06 Deposition of K. Osborne at 12:1-19, 13:10-14.

²¹ *Id.*

²² *Id.*

²³ SSER at 207-211, 01-14-08 Deposition of K. Osborne at 26:9-28:5; 28:9-29:6; 29:12-30:1.

²⁴ Twelve Counties' Supplemental Excerpts of the Record (hereinafter "CSER") at 25-28 Trial Transcript at 568:23-571:24.

²⁵ *Id.*

completed registration, and in the process successfully convincing non-citizens to register to vote.²⁶

As has been discussed in the State's Brief, the intentions of those who are illegally registering to vote does not diminish the diluting effect that those registrations and cast votes have on the voting power of legitimately registered citizens. Moreover, before the enactment of Proposition 200 there was no adequate safeguard in effect to assure the protection of non-citizens who may not have intended to engage in illegal conduct, but who fell victim to misinformation or unfortunate tactics in the process nonetheless. Under the old system, a non-citizen who registered to vote, regardless of their intention, encountered nothing to stop that registration from being processed. Once processed, the non-citizen had violated the law and could be deemed ineligible for citizenship.²⁷ In order to counter any misinformation about voter registration eligibility, Maricopa County increased its voter registration and outreach efforts, but understandably could not

²⁶ SSER at 207-211, 01-14-08 Deposition of K. Osborne at 26:9-28:5; 28:9-29:6; 29:12-30:1.

²⁷ *In Re Centi*, 211 Fed. 559 (W.D. Tenn. 1914) (non-citizen that was registered to vote and voted was not of good moral character and not entitled to be admitted as a citizen). *But see* 8 U.S.C.A. § 1101(f) (A finding of absence of good moral character may not be made in the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a federal, state, or local election in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien is or was a citizen, the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement, claim, or violation that he or she was a citizen.

reach everyone.²⁸ Proposition 200, on the other hand, provides a more uniform and effective mechanism for preventing these errant registrations without imposing any penalty on the registrant.

The questionable tactics used against resident non-citizens to register them and assure their turnout for the vote are not the only type of voter fraud that the enactment of Proposition 200 has deterred in Arizona. Ms. Osborne also testified, for example, about one voter registration organization that, in 2004, submitted completed voter registrations forms she could only describe as “garbage.”²⁹ Following the passage of Proposition 200, the rate of rejection of voter registrations was high at first, then declined in 2006 after the registration forms were altered to reflect the new requirements, but went back up in 2007.³⁰ Ms. Osborne attributed the spike of voter registration rejection in 2007 to another large voter registration organization that pays its circulators a set dollar amount per completed form and which was submitting unverifiable forms, similar to the “garbage” forms seen in 2004.³¹ Ms. Osborne explained that voter registration forms rejected prior to passage of Proposition 200 could only be rejected based on the face of the registration, such as detecting forgery or *clear* fabrication.³² Thus,

²⁸ SSER at 207-211, 01-14-08 Deposition of K. Osborne at 26:9-28:5; 28:9-29:6; 29:12-30:1.

²⁹ *Id.* at 209-211, 01-14-08 Deposition of K. Osborne at 28: 9-30: 1.

³⁰ CSER at 75-76, 01-14-08 Deposition of K. Osborne at 69: 6-70:24.

³¹ *Id.*

³² *Id.*

it is likely that many of the 2004 “garbage” forms were entered into the voter rolls, despite the strong suspicion that they were not the result of a live person choosing to register. With the implementation of the proof of citizenship requirement, the registrant must prove that he or she is the person completing the form, rather than a forger, and a person that actually exists.³³ Since fictitious people will not have proof of citizenship and a forger is unlikely to have sufficient proof of citizenship for the person as whom he is posing, the law now provides a mechanism to keep these “garbage” registrations off the voter rolls.

B. Passage and Implementation of Proposition 200.

By approving the Arizona Taxpayer and Citizen Protection Act in the November 2004 General Election, Arizona’s voters implemented two voting changes in order to ensure that only eligible applicants were registering to vote and voting.³⁴ Acting on the power reserved to them by the Arizona Constitution, Arizona’s voters obviously recognized two problems in their voting system that did not have adequate detection or prevention mechanisms prior to enactment: (1) the complete lack of any verification of a potential registrant’s U.S. citizenship; and (2) the lack of verification of a voter’s identity on election day. The “honor” system was just not working or acceptable. The law that Arizona voters enacted in

³³ *Id.*

³⁴ ER 10.

response to these problems is a reasonable, even-handed regulation designed to protect Arizona's electoral system from the very real dangers of election fraud by simply requiring an unobtrusive presentation of proof of citizenship for registration and a reasonable form of identification for voting at the polls.

In light of the real potential for abuse, these are reasonable requirements, and no real imposition to the right to vote in our free society. What is at issue then is the claim that somehow these reasonable requirements to insure the integrity of the voting system have placed some unreasonable or disproportionate restriction on voters of Latino heritage and naturalized citizens. The fact is, however, that there was insufficient evidence of any discriminatory intent in the enactment of Proposition 200, and the District Court found that there was also insufficient evidence of a disparate, discriminatory impact on either group. The express and stated purpose of Proposition 200 was to eliminate the receipt of public benefits, reserved for citizens, by persons unlawfully present in the State and to prevent ineligible persons, specifically non- U.S. citizens, from voting or registering to vote in the State's elections.³⁵

Certainly, the State and Counties have the right and obligation to protect the integrity of their elections by imposing reasonable restrictions that are narrowly

³⁵ ER 10. As explained fully in the State's Brief, the only portions of Proposition 200 which were challenged in the District Court and which are the subject of this appeal are the voting-related portions.

designed for that purpose. Citizenship is a fundamental requirement for voting and it is based on this legitimate voting qualification, and not any impermissible basis, that Arizona's voting law in any way classifies persons. Plaintiffs failed to establish at trial that there is an unreasonable burden placed upon them that is distinguishable from the limited burden placed on all other qualified voters.³⁶ Moreover, while Plaintiffs have attempted to portray a stacked system that prevents them from having the opportunity to vote, the actual facts presented proved just the opposite – not a single Plaintiff proved they were unable to register or vote at the polls on election day.³⁷ As such, there was clearly sufficient evidence in the record to support the conclusion that the changes enacted by Proposition 200 did not create an undue burden on any class of people.³⁸

Thus, the Court found that Arizona voters took appropriate proactive and preemptive steps to detect and deter voter fraud and to promote public confidence in the electoral process by passing Proposition 200 and that this is a reasonable, non-discriminatory regulation.³⁹ Given the positive prophylactic purpose and effect of the Proposition 200 requirements, the objection to them is highly questionable. It is especially puzzling given the fact that there is no evidence of any actual discrimination or abuse in the application of the law and certainly no evidence that

³⁶ ER 3, CR 1041 at 30-33.

³⁷ *Id.* at 17-21.

³⁸ *Id.* at 30-33

³⁹ *Id.* at 35.

Plaintiffs are unable to comply with the law with minimal effort.⁴⁰ Given the reasonable, non-discriminatory nature of the regulation at issue and all of the evidence that has been presented about it, as considered by the lower court, it is nothing but disingenuous to continue to characterize the law in terms of race or national origin related issues.

No one argued for example, that there has not been a real history of discrimination against and, in some places, even abuse of Hispanics by members of the citizenry. No one argued that lawful immigrants do not continue to experience struggles by virtue of being in a new country or because of language barriers that may interfere with their transaction of everyday business with a majority that does not share their background. That has been the history of this country in the modern era. The Counties in no way condone the historic mistreatment of anyone based on race or national origin and do not intend to be characterized as doing so by virtue of their advocacy here. But, these historic factors alone do not comprise the entire issue undertaken by the District Court. The District Court properly found that Plaintiffs failed to demonstrate a causal link between the historic, and other statutory factors, and any alleged voting infringement.⁴¹ Most of Plaintiffs' evidence at trial was anecdotal in nature, speculative, and conjectural. In reality,

⁴⁰ *Id.* at 17-21.

⁴¹ ER 3, CR 1041 at 46-47.

Plaintiffs did not meet the burden of establishing any impediment or severe burden to voting by virtue of the passage of Proposition 200 at all.

There is some degree of educational requirement that naturally comes with the passage of every law, and the State and Counties have undertaken the job of informing Arizona citizens about the changes to the voting laws in a responsible fashion.⁴² However, the orientation of our citizenry to new laws and regulations is neither anything new nor a legitimate basis on which to overturn them. It is certainly not unduly burdensome on the citizenry as it pertains to this case. Thus, the facts did not support Plaintiffs' claims. There was sufficient evidence to support the Twelve Counties' position that citizens of this country, having either been born here or having taken the trouble to become citizens, are not unduly burdened by Arizona's law that is intended to insure the integrity of the voting process.⁴³ Indeed the Court found that, in most cases, individuals can comply with the voting regulations for both registering and voting simply by using their driver license.⁴⁴ It is insulting to presume that someone who has taken the time and trouble to become a naturalized citizen cannot and would not comply with the simple requirements set forth by the Arizona law.

⁴² CSER at 32-34, Trial Transcript at 685:15-687:15.

⁴³ ER 3, CR, 1040 at 30-34.

⁴⁴ *Id.* at 9.

It is also clear that the County election officials, despite a few anticipated hiccups in enforcement issues while the new law was being implemented statewide, have done a superb job in doing all they can to make sure people are NOT shut out of the system and have every opportunity to comply without undue burden.⁴⁵ Despite every possible roadblock introduced by Plaintiffs, the Court properly concluded that the law is narrowly tailored to advance the compelling state interest of ensuring the integrity of its elections.⁴⁶ Its careful implementation has resulted in few, if any, individuals being improperly turned away from the voting process. In short, this important legislation has been incorporated into Arizona's election system with great success. Plaintiffs failed to present evidence of a single naturalized citizen or citizen of Latino heritage, who was qualified to register and cast a vote, that has been unable to do so due to the Proposition 200 regulations.⁴⁷

C. Arizona's Successful Elections and Registration with Proposition 200.

Since the implementation of the law, Arizona has administered it evenly and fairly to all people seeking to register to vote or to vote at the polls on election day. No one is being turned away because of his race or national origin and compliance with the law is not an undue burden. Indeed, Plaintiffs have failed in proving any

⁴⁵ *Id.* at 32-33, FN 20.

⁴⁶ *Id.* at 35.

⁴⁷ *Id.* at 17-27.

real harm that has resulted from the implementation of this law. In fact, each and every one of the named Plaintiffs in this lawsuit is able to register to vote and to vote at the polls on election day.⁴⁸ Plaintiffs have not been able to produce a single Latino or naturalized citizen who has been unable to comply with the law. This is largely because the State and Counties have gone to great lengths to ensure the successful registration and ability to vote of those who are eligible to participate in our electoral process.⁴⁹

a. County elections officials have ensured successful registration.

When it comes to registration, the vast majority of Arizonans can and do use their driver license or non-operating ID to register to vote.⁵⁰ Despite Plaintiffs' claims to the contrary, this includes naturalized citizens. See Plaintiffs' Opening Brief at 7. The County Recorders have been clear in their testimony that even on the rare occasion when a naturalized citizen still retains an old "Type F" license, it does not preclude them from registering to vote.⁵¹ In that circumstance, the

⁴⁸ *Id.* at 17-19.

⁴⁹ ER 3, CR, 1040 at 32 FN. 19; 36 FN. 22.

⁵⁰ *Id.* at 9; CSER at 70-73, 01-14-08 Deposition of K. Osborne at 31:18-34:2.

⁵¹ Plaintiffs have incorrectly asserted that "registrants flagged as 'Type F' are understood by County Recorders to be non-citizens who are ineligible to vote." Plaintiffs' Opening Brief at 7. Only two of the four citations listed for this proposition even refer to the testimony of County Recorders and one of those citations was not included in Plaintiffs' excerpts. In reality, Ms. Laura Dean-Lytle, one of the County Recorders cited to, indicated that she was not aware of the specifics of the DMV matching system but she had heard that there was a license designation that indicated that an individual was present legally but not a citizen. CSER at 87-89, 01-16-08 Deposition of L. Dean-Lytle at 81:13-83:5. Ms. F. Ann Rodriguez, the other County Recorder purportedly cited to but not included in Plaintiffs' excerpts, clarified that an individual who had

individual merely needs to produce documentation that actually proves their citizenship, since the driver license has not accomplished this.⁵² Even though a driver license satisfies the requirement for most citizens, the State and Counties have engaged in vast educational campaigns designed to inform citizens of the requirements of Arizona's voting law and designed to assist all citizens in complying with the law when registering and voting in person at the polls.⁵³

In particular, the Counties have specifically reached out to naturalized citizens. Regularly scheduled naturalization ceremonies⁵⁴ occur once a week in Arizona, in two locations - Phoenix (Maricopa County) and in Tucson (Pima County), at the federal courthouses.⁵⁵ The elections officials in Maricopa County and Pima County attend each and every one of these naturalization ceremonies in order to provide newly naturalized citizens with the immediate opportunity to register to vote.⁵⁶ Newly naturalized citizens can make use of the assistance provided by the elections officials at these gatherings to ensure that their registration forms are filled out properly and can turn their registration forms in

been flagged as having a "Type F" license could provide alternative proof of citizenship in order to register. CSER at 109, 01-22-08 Deposition of F. Ann Rodriguez at 172:8-16.

⁵² CSER at 109, 01-22-08 Deposition of F. Ann Rodriguez at 172:8-16.

⁵³ CSER at 32-34, Trial Transcript at 685:15-687:15.

⁵⁴ There is also a large naturalization ceremony that occurs at a public venue on Fourth of July each year and the elections officials are present at this special ceremony as well. CSER at 67-69, 01-14-08 Deposition of K. Osborne at 22:19-24:12.

⁵⁵ CSER at 67-69, 01-14-08 Deposition of K. Osborne at 22:19-24:12; CSER at 99-105, 01-22-08 Deposition of F. Ann Rodriguez at 30:7-36:19.

⁵⁶ *Id.*

directly to the elections officials, without so much as buying a stamp.⁵⁷ Even if the new citizen does not reside in Maricopa or Pima County, their registration forms are accepted by the local election officials and are mailed, at County expense, to their home County.⁵⁸ Newly naturalized citizens can show the elections officials their Certificate of Naturalization immediately after the ceremony and the officials will certify on the registration form that proof of citizenship has been provided.⁵⁹ The other counties accept the verification performed by Maricopa and Pima County election officials and the registrant is not required to provide any additional citizenship information to his or her home county. Alternatively, the registrant can provide their “A”-number and the elections officials from their home county will verify that number with the INS database.

Plaintiffs, however, present the highly theoretical concern that individuals may have to present additional proof of citizenship if they: (1) are new citizens; (2) providing only their “A”-number as proof of citizenship; (3) attempting to register within two-weeks of a registration deadline; and (4) their updated INS status does not timely appear in the federal database. Plaintiffs’ Opening Brief at 13-14. While it is true that the Secretary of State has established prophylactic

⁵⁷ *Id.*

⁵⁸ *Id.*; CSER at 83-84, 01-16-08 Deposition of L. Dean-Lytle at 30:11-31:13; CSER at 115, 01-18-08 Deposition of K. Marin at 20:8-23; CSER at 121-22, 01-22-08 Deposition of A. Trujillo at 20:15-21:3.

⁵⁹ CSER at 67-69, 01-14-08 Deposition of K. Osborne at 22:19-24:12; CSER at 99-105, 01-22-08 Deposition of F. Ann Rodriguez at 30:7-36:19.

guidelines for even this highly theoretical scenario, it is notable that there was insufficient evidence of any individual actually being caught in this position. This is largely because the County elections officials are present at the naturalization ceremonies to view new citizens' actual Certificates of Naturalization and certify that proof of citizenship has been provided.⁶⁰ Thus, there is no need to further verify that citizen's information with the federal database. Plaintiffs' highly speculative concerns have not been a reality.

Furthermore, Plaintiffs' concern that naturalized citizens are more severely burdened because they have to appear in person to present their Certificates of Naturalization is equally unfounded. The Counties have interpreted "presentation" to include a legible photocopy of the Certificate of Naturalization. Admittedly, Certificates of Naturalization do say on their face that they should not be photocopied. So do birth certificates.⁶¹ However, the Counties do allow people who choose to photocopy their own documents to present those legible photocopies as proof of citizenship.⁶² Joseph Kanefield acknowledged the County Recorders' independent statutory duty to register voters and confirmed that they

⁶⁰ *Id.*

⁶¹ CSER at 55, 07-31-06 Deposition of K. Osborne at 39:1-5.

⁶² CSER at 55-56, 07-31-06 Deposition of K. Osborne at 39:1-40:13.

are not violating any law or procedure by accepting such photocopies of the documents.⁶³

Due in no small part to the diligence of the State and County elections officials, there has been no disparate impact realized on any class of persons with the implementation of Proposition 200 into the election laws of Arizona. Proposition 200's implementation has been, and continues to be, applied evenly and equally to every individual attempting to register or vote at the polls in Arizona. Not a single one of the Plaintiffs showed they were unable to register or vote in person at the polls on election day.⁶⁴ Moreover, none of the organizational plaintiffs could identify a single person who has been disenfranchised by the implementation of the Proposition 200 requirements.⁶⁵ Not one of Plaintiffs' five experts provided credible information to show that Latino citizens have been harmed by the implementation of proof of citizenship at the time of registration. Dr. Espino studied Hispanic voter registration trends and testified that in two-thirds of Arizona's counties, Hispanics are actually **doing better** after Proposition 200 insofar as registration than they were before Proposition 200.⁶⁶ Similarly Dr. Lanier's data showed that Latino and non-Latino voter registrations have actually

⁶³ CSER at 40-41, Trial Transcript at 755:23-756:9.

⁶⁴ ER 3, CR 1040 at 17-19.

⁶⁵ *Id.* at 19-21; Notably, however, the organizational plaintiffs which had representatives testify at trial were forced to admit that they did not know if those that they had registered to vote prior to the implementation of Proposition 200 were actually citizens and eligible to vote in Arizona. SSER at 36-37, 46, Trial Transcript at 505:11-506:10, 574:9-16.

⁶⁶ SSER at 26-30, Trial Transcript at 420:10-424:18.

increased since the passage and enactment of Proposition 200.⁶⁷ This is all while Latino *citizen* voting age population has experienced a smaller growth rate than non-Latino citizen voting age population following the implementation of Proposition 200.⁶⁸ Dr. Lanier's testimony was essentially that there is only a 0.1% difference between what the Hispanic representation in the Arizona electorate likely would have been if Proposition 200 had not gone into effect and what it is now. His prediction was that, if not for Proposition 200, Hispanics would make up 13.8% of the voter registrations in Arizona in the post-Prop 200 period.⁶⁹ Dr. Lanier's calculated percentage of actual Hispanic registrants among all registrants since Prop 200, however, is 13.7%.⁷⁰

Furthermore, Dr. Lanier made no credible effort to determine whether this difference was a result of ineligible applicants being denied registration.⁷¹ In fact, none of Plaintiffs' experts even attempted to discern this important fact. The District Court allowed Plaintiffs every opportunity to discover anyone who might possibly have been detrimentally impacted by the implementation of the Proposition 200 requirements. The District Court specifically recognized the significance of the discovery that was undertaken in an attempt "to give Plaintiffs

⁶⁷ SSER at 135-36, Trial Exhibit 879.

⁶⁸ SSER at 2-5, Trial Transcript at 48:22-24; 50:24-51:7; 56:4-14.

⁶⁹ CSER at 17, Trial Transcript at 317:1-4.

⁷⁰ CSER at 42-47, Trial Transcript at 798:6-803:9.

⁷¹ SSER at 17-18, Trial Transcript at 315:12-316:10.

access to all data in Defendants' possession to make their case."⁷² While Plaintiffs attempted to present the data in such a way so as to suggest that a disparate impact had been experienced by Latino citizens who are eligible to vote, the reality was that, even with the extensive discovery provided to them, they were unable to present sufficient data to support this conclusion. *See* Plaintiffs' Opening Brief at 16-18. Neither Plaintiffs nor any of their five experts ever undertook an analysis of the qualifications, i.e. age, citizenship, non-felon, of those who attempted to register to vote, but purportedly remained unregistered at the time of trial.⁷³

b. County elections officials provide sufficient identification for voting.

The implementation of Proposition 200 mandates that a voter, who is voting in person at the polls on election day,⁷⁴ must provide one form of valid photo identification or two forms of valid non-photo identification that bears his name and address.⁷⁵ No expert testimony was provided by Plaintiffs to support the contention that Latinos have been disparately impacted by the voting identification requirements. In reality, no one could credibly offer that opinion because each County offers at least two forms of non-photo ID, free of charge – the Voter

⁷² ER 3, CR 1040 at 2.

⁷³ *See* SSER at 17-18, Trial Transcript at 315:12-316:10.

⁷⁴ As detailed in more depth by the State, Proposition 200 did not have any impact on early voting in Arizona, either in person or through the mail. This is largely because there were already security measures in place to ensure that an early ballot was actually submitted by the voter listed on the ballot. CSER at 58-59, 07-31-06 Deposition of K. Osborne at 75:13-76:15; CSER at 41, Trial Transcript at 756:10-22. These measures include checking the voter's signature and other identifying information. *Id.*

⁷⁵ ER 44.

Registration Card and a Recorder's Certificate.⁷⁶ Many send out official election mail that can be used as non-photo ID as well.⁷⁷ Furthermore, State and County officials collaborated to make the list of acceptable non-photo identification as inclusive as possible, including bank statements, billing statements of all types, and even an Arizona Vehicle Registration.⁷⁸

Despite the liberal discovery afforded to them, Plaintiffs failed to produce evidence of eligible individuals who are unable to vote in person at the polls on election day due to Arizona's law. In fact, Gonzalez Plaintiffs have produced the untested⁷⁹ declarations of only two individuals who allege that, as a result of poll worker error, their ballots were improperly uncounted.⁸⁰ As the State has correctly pointed out, more than **3 million ballots** were cast in the last three statewide elections. Thus, *even if* the declarations were taken as true, Plaintiffs have merely shown that **two** of three million ballots, or 0.0000000067%, went improperly uncounted. Neither of these individuals is a plaintiff in this case. Neither of these individuals is Latino. Neither of these individuals is a naturalized citizen. Plaintiffs attempt to counter this staggering fact by listing a number of percentages

⁷⁶ CSER at 57, 60, 07-31-06 Deposition of K. Osborne at 56:1-15, 111:3-21; CSER at 109, 01-22-08 Deposition of F. A. Rodriguez at 172:17-23; CSER at 85-86, 90-91, 01-16-08 Deposition of L. Dean-Lytle at 41:11-42:3, 85:18-25, 100:9-20.

⁷⁷ SSER at 93, Trial Transcript at 748:22-25.

⁷⁸ CSER at 29-31, Trial Transcript at 670:22-672:6.

⁷⁹ Defendants were not provided with the declarations of these individuals prior to trial and were never provided with the opportunity to cross-examine these individuals.

⁸⁰ ER 46-47.

regarding the proportion of Latinos in the voting population versus the proportion of Latinos who purportedly cast uncounted conditional provisional ballots, even citing to a non-scientific count conducted by Maricopa County,⁸¹ but they utterly failed to place these numbers in any relevant or probative context for the Court. *See* Plaintiffs' Opening Brief at 19-20. Specifically, despite Plaintiffs' access to contact information for most, if not all, of the individuals who cast uncounted conditional-provisional ballots, Plaintiffs never offered any evidence that any of these ballots went uncounted because the individual did not have and could not reasonably attain appropriate identification.

No one claims here that every election is perfect. However, Arizona has gone to great lengths to ensure that all of its election laws are reasonable and are applied in a non-discriminatory fashion. The evidence presented at trial proved only that the reasonable requirements of Proposition 200 have been soundly implemented to the detriment of very few people and, even then, not based on race or other questionable classifications.

⁸¹ Plaintiffs engaged five experts during the course of this litigation who could not point to any evidence to show a disparate impact on Latinos. As a last resort, Plaintiffs turned to a PowerPoint presentation prepared by Maricopa County. ER 49. As if it even needed to be said, the presentation includes a disclaimer that this was not conducted as a scientific study, that Maricopa County is using an old Hispanic surname list at the direction of the Department of Justice, and it was merely an "elementary effort" to gauge where they were as a county. *Id.* at 6. Any effort by the Plaintiffs to use this presentation as a substitute for bona fide expert testimony is disingenuous.

SUMMARY OF THE ARGUMENT

Arizona's implementation of the requirements of Proposition 200 has been even-handed and non-discriminatory. There was simply no evidence sufficient to support Plaintiffs' claims that Arizona's voting law violates the Constitution or the federal voting laws and, as such, the Twelve County Defendants/Appellees respectfully urge this Court to uphold the findings of the District Court and deny Plaintiffs/Appellants the declarative and injunctive relief that they sought.

ARGUMENT

The Twelve Counties join fully in the standard of review set forth in the State's briefs and the legal argument presented therein and incorporate it herein by this reference as if fully stated. In the interest of judicial economy, the Twelve Counties will not restate the well-pleaded arguments of the State herein and instead adopt those arguments and supplement them with the arguments and issues unique to the Counties.

I. ARIZONA ACCEPTS AND USES THE FEDERAL VOTER REGISTRATION FORM.

It should be noted that Plaintiffs cannot argue that Arizona does not accept and use the federal voter registration form. There has been no evidence to suggest that the County Recorders do not accept the federal form, as required by law. Plaintiffs instead have asserted that Arizona's proof of citizenship requirement violates the National Voter Registration Act ("NVRA"). Section 6 of the NVRA

provides that states either must accept and use the federal mail-in registration form prescribed by the Election Assistance Commission or must develop and use the state's own form, which must conform to the federal guidelines. *See* 42 U.S.C. § 1973gg-7(a)(2). According to Plaintiffs, the Act prohibits states from requiring proof of citizenship to register to vote because the federal form includes a “check box” for applicants to verify citizenship but does not contain a separate requirement of proof of citizenship. Plaintiffs’ argument was rejected by the District Court early on in this litigation, and this Court affirmed the lower court’s analysis of Plaintiffs’ NVRA claim, holding that “[t]he language of the statute does not prohibit documentation requirements. Indeed, the statute permits states to ‘require [] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant.’” *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir., 2007) (quoting 42 U.S.C. § 1973gg-7(b)(1)) (alterations and ellipses in original). Because “[t]he NVRA clearly conditions eligibility to vote on United States citizenship,” the Act’s provisions permit states to “require their citizens to present evidence of citizenship when registering to vote.” *Id.* at 1050-51.

Plaintiffs have asserted that Arizona should be prohibited from implementing its proof of citizenship law because the NVRA does not provide for notarization or other formal authentication of an applicant’s signature. Plaintiffs’

Opening Brief at 31. Plaintiffs have attempted to frame Arizona's proof of citizenship requirement as an authentication of the actual registration form or applicant's signature. This is misleading. As this Court recognized during the interlocutory appeal herein, Arizona is not requiring an "authentication." Rather, Arizona's law requires some evidence of citizenship, which is inarguably a legitimate requirement to vote. It was not persuasive for Plaintiffs to argue that a State is not permitted to verify an applicant's citizenship, age, or other fundamental voting condition as a condition of the right to vote in our elections. If this were the case, a State would not be able to verify the citizenship of any applicant or voter – even if his qualifications were questioned. This is unquestionably not the applicable standard and Arizona is certainly permitted to require the verification of citizenship upfront, as long as it is evenly applied in a non-discriminatory fashion, as Arizona's law has been. Furthermore, the District Court specifically found that the text of the NVRA did not support Plaintiff's interpretation of the statute and its requirements.⁸² The District Court also found that Arizona's proof of citizenship law fell squarely within the spirit of the NVRA, specifically citing the NVRA's provision that the voter registration form may require "such identifying information... and other information..., as is necessary to enable the appropriate

⁸² CSER at 131, 133-35, DKT. #68 at 8, 10-12.

State election official to assess the eligibility of the applicant...”⁸³ Arizona’s proof of citizenship requirement does not violate the clear language of the NVRA⁸⁴ or frustrate its purpose. It simply allows the State and County elections officials to assess the eligibility of the applicant, which is explicitly permitted by the statute.

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO ESTABLISH A VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Arizona’s law is a reasonable, even-handed regulation designed to protect the electoral system from the very real dangers of election fraud by simply requiring proof of citizenship for voter registration and a reasonable form of identification of the voter at the polls. The District Court further properly found that Plaintiffs did not show that Proposition 200 was enacted with the necessary intent or purpose to discriminate against a protected class, including race or national origin. Instead, the Proposition 200 requirements, which have been implemented into law, classify individuals based upon valid, voting requirements – specifically citizenship and actual identity. These requirements were enacted with the specific purpose of preventing and eliminating fraud in the electoral process, a goal in which the State inarguably has a compelling interest. *Crawford*, 128 S. Ct. at 1617, 1619 (recognizing states’ interests of deterring and detecting voter fraud

⁸³ CSER at 131-32, DKT #68 at 8-9 (citing 42 U.S.C. 1973gg-7(b)(1) (parenthetical examples omitted here)).

⁸⁴ Because the language of the statute is clear on its face, any inquiry into legislative history is inappropriate in interpreting the statute. *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1092 (9th Cir., 2006) (overturned on other grounds).

and promoting public confidence in the integrity of the electoral process, even in absence of any evidentiary showing of fraud in the state's electoral process.)

While a facially neutral law can still be found to violate the Equal Protection clause if “some invidious or discriminatory purpose underlies the policy,” Plaintiffs have also not presented sufficient evidence to support the argument that there is invidious discrimination against Latinos or naturalized citizens. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 -687 (9th Cir., 2001) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.”)). In an attempt to bolster this argument, however, Plaintiffs essentially assert that naturalized citizens are discriminated against in three ways: (1) that their documents cannot be presented by photocopy to the County Recorders; (2) that naturalized citizens have to produce their INS registration number; and (3) that some naturalized citizens may hold “Type F” licenses, which is not sufficient evidence of citizenship. Plaintiffs’ Opening Brief 38-47. In reality, naturalization documentation – whether it is in the form of the Certificate of Naturalization or the “A”-number – is simply one more **option** that naturalized citizens can utilize when registering to vote.

A. Plaintiffs Are Not Disproportionally Impacted by Having to Present Documents in Person

First, it should be noted that naturalized citizens are not restricted to using their naturalization information in order to register to vote. It is highly likely that a great many naturalized citizens may have other means of proving their citizenship. They may be able to use their driver license or non-operating ID number, like Mrs. Gonzalez did.⁸⁵ They may be able to use their U.S. passport, as Mr. Gonzalez could.⁸⁶ All things considered, naturalized citizens have even more options when proving citizenship than persons born in the United States. It is presumptuous to claim that these persons, who have worked hard and have taken the time to become citizens of the United States, are unable to comply with the straightforward provisions of the laws enacted by Proposition 200. There was no evidence to support such a gross generalization. In fact, the District Court agreed that naturalized citizens have more options when registering to vote than natural born citizens do, and pointed out that they have the additional option of simply writing a number from their naturalization process, which natural born citizens cannot do, because birth certificates have no such number that can verify their US birth.⁸⁷

As described earlier, naturalized citizens are permitted to submit copies of their Certificate of Naturalization, if they so choose. The Counties have deemed

⁸⁵ CSER at 6-8, Trial Transcript at 213:24-214:7, 220:3-12.

⁸⁶ SSER at 12-13, Trial Transcript at 225:25-226:3.

⁸⁷ ER 3 at 38.

this action a presentation within the parameters of the Proposition 200 requirements and the Secretary of State's office has verified that the Counties are secure in this interpretation.⁸⁸ The District Court specifically recognized that the Counties permit individuals to submit photocopies of their naturalization documents and stated that "it is the applicant's choice to travel to the county recorder to present a naturalization certificate."⁸⁹ When an original Certificate of Naturalization or a photocopy is presented to the Counties as proof of citizenship, the County need not verify the "A"-number.⁹⁰ The presentation of a Certificate of Naturalization can be likened to the presentation of a birth certificate for individuals who were born in the United States. In both cases the person either has to bring the original to the Recorder's Office or send a photocopy, and in both cases, documents that reasonably appear to be authentic are accepted on their face and no further verification is conducted.⁹¹ Since citizens born in the United States will not have naturalization certificates and those who have been naturalized will not have birth certificates that prove U.S. citizenship, it only makes sense to permit each to provide the document that he has to prove his citizenship. This common-

⁸⁸ CSER at 40-41, Trial Transcript at 755:23-756:9; CSER at 55-56, 07-31-06 Deposition of K. Osborne at 39:1-40:13; CSER at 106-08, 01-22-08 Deposition of F. A. Rodriguez at 67:25-69:6.

⁸⁹ ER 3, CR 1040 at 31-32. The testimony of Joseph Kanefield and the express finding of the District Court in this regard rebut Plaintiffs' assertion that any acceptance of photocopies is "informal" and the accompanying implication that this Court should overlook the actual practices in Arizona. *See* Plaintiffs' Opening Brief at 44, footnote 113.

⁹⁰ CSER at 52-54, 07-31-06 Deposition of K. Osborne at 35:9-19, 37:11-38:18.

⁹¹ *Id.*; CSER at 74, 01-14-08 Deposition of K. Osborne at 50:10-21.

sense policy directly contradicts Plaintiffs' claims that naturalized citizens are singled out for disparate treatment under Arizona's law. Indeed, the only requirements being investigated are those that are fundamental to the right to vote, namely citizenship. The law simply permits each applicant to verify his citizenship in the manner that is most fitting for him.

B. Production of the INS Number is Not Discriminatory

Plaintiffs continue to argue that the State and Counties do not have authority to request an applicant's "A"-number during the registration process. However, A.R.S. § 16-166(F)(4) requires satisfactory evidence of United States citizenship and allows the "presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization." The simple fact is that Proposition 200, like many other laws, contained an ambiguous term – "the number of the certificate of naturalization." There are two different series of numbers in the upper right hand corner of a Certificate of Naturalization.⁹² The first set of numbers appears to be a scroll number and is preceded only by the abbreviation for the word number, "No." The second set of numbers is identified as the "INS Registration No." and begins with the letter "A." *Id.* There is no number that is designated as "the number of the certificate of naturalization."⁹³

⁹² SSER at 129, Trial Exhibit 715.

⁹³ *Id.* It is clear that there is not a consensus as to the precise meaning of "the number of the certificate of naturalization," as suggested by Plaintiffs. *See* Plaintiffs' Opening Brief at 10. If

This creates an ambiguity that necessitated resolution by elections officials. A.R.S. § 1-221(B) (“Statutes shall be liberally construed to effect their objects and to promote justice.”) It is clear from the legislative history that the drafters of the term meant for the State and Counties to request a number that could be verified with the federal government.⁹⁴ As such, rather than taking the rigid approach that arbitrarily designates only one of the two sets of numbers as the “number of the certificate of naturalization,” the County election officials interpret the statute to mean that only the set of numbers that actually verifies the registrant’s citizenship is required. This reasonable resolution to the law’s ambiguity has been memorialized in the State’s Procedures Manual, which has the operation and effect of law. The District Court recognized the reasonableness of this interpretation and has the responsibility to give deference to the reasonable interpretation of statutes by state officials.⁹⁵

“It is axiomatic that ‘[t]he starting point in every case involving construction of a statute is the language itself.’” *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (quoting *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., Concurring)). For clear and unambiguous statutory language a court “need not resort to either the agency’s interpretations or the statute’s

there were, State and County officials would not have been in the position to otherwise interpret the meaning of the statute.

⁹⁴ ER 10, Trial Exhibit 1.

⁹⁵ ER 3, CR 1041 at 30.

legislative history.” *Reynolds*, 435 F.3d at 1092. Given the ambiguity of the term “number of the certificate of naturalization,” the court was required to defer to the administering agencies’ interpretation or to investigate legislative history to determine the most reasonable interpretation. *Saratoga Sav. & Loan Ass’n. v. Federal Home Loan Bank Bd.*, 879 F.2d 689, 693 (9th Cir., 1989); *Davis v. Pacific Capital Bank, N.A.*, 550 F.3d 915, 917 (9th Cir., 2008). In turning to either of these resources, the District Court necessarily reached the same conclusion that the State and Counties reached – that a reasonable interpretation of this term is to request and verify an applicant’s INS registration, or “A”-number.

Plaintiffs argue that requesting this information is confusing and demeaning to applicants. Plaintiffs’ Opening Brief at 44-45. However, that is not so, particularly when one considers the process and purpose that is being engaged. Arizona is attempting to verify citizenship. For naturalized citizens, part of the process of becoming a U.S. citizen involves being assigned an “A”-number and indeed this is the **only** number by which the federal government can provide verification of citizenship status.⁹⁶ Therefore, it is no more demeaning or confusing to ask a naturalized citizen for his “A”-number than it would be to ask a married woman for her maiden name. *See* Plaintiffs’ Opening Brief at 13, 24, 44-

⁹⁶ ER 3, CR 1040 at 30.

45. Neither piece of information would be in current use by the individual, but both are reasonable when establishing citizenship or identity. *Id.*

In a final attempt to create the appearance of discrimination where none exists, Plaintiffs' argue that the State is requesting an applicant's "A"-number because it mistakenly believes that the "A"-number appears on every Certificate of Naturalization. Plaintiffs' Opening Brief at 14. This is not true. While Mr. Kanefield did provide testimony that he thought the "A"-number appeared on every Certificate of Naturalization, he provided no testimony to suggest that the decision to request the "A"-number was based on that belief.⁹⁷ That decision was made, as stated above, because it was the most reasonable interpretation, given the legislative history and intent, to resolve the ambiguity in the statute. More importantly, this argument is completely irrelevant. Plaintiffs do not allege that each naturalized citizen does not have a Certificate of Naturalization. Nor do they allege that each naturalized citizen does not have an "A"-number that was assigned to them. They merely allege that for some people the number may not appear on the certificate. Since either the Naturalization Certificate *or* the "A"-number are alone sufficient to prove citizenship, they need not appear together and Plaintiffs' argument is unavailing.⁹⁸

⁹⁷ ER 12, Trial Transcript at 719:18-23.

⁹⁸ If Plaintiff intended to argue that the "A"-number cannot reasonably be interpreted as "the number of the certificate of naturalization" because it does not appear on some Certificates of

C. Naturalized Citizens with “Type F” Licenses are Not Discriminated Against

Contrary to Plaintiffs’ assertions, individuals with “Type F” licenses are not flagged as being ineligible to vote. Plaintiffs’ Opening Brief at 7. Rather, they are flagged as not having presented sufficient proof of citizenship.⁹⁹ This same type of flagging would happen for a natural born citizen who wrote down the number for a driver license or non-operating ID that was issued prior to October 1996. If a naturalized citizen has not updated his driver license since his naturalization, he certainly has the option to take that opportunity to do so. However, contrary to Plaintiffs’ assertions, a naturalized citizen is not forced to update records with MVD or pay a fee in order to register to vote.¹⁰⁰ The individual may exercise any one of the other proof of citizenship options available to him, including providing a photocopy of passport documents, presenting his Certificate of Naturalization, or providing his INS registration number, or “A”-number.¹⁰¹ Furthermore, contrary

Naturalization, this argument must also fail. The State and Counties made their interpretation of the ambiguous statutory term in light of the state of the Certificate of Naturalization when the initiative was being drafted. Certificates of Naturalization had long-since contained the “A”-number by the time Proposition 200 was being drafted and voted upon. Thus, the interpretation reached by the State and Counties is still a reasonable resolution of the ambiguity.

⁹⁹ CSER at 87-89, 01-16-08 Deposition of L. Dean-Lytle at 81:13-83:5; CSER at 109, 01-22-08 Deposition of F. A. Rodriguez at 172:8-16.

¹⁰⁰ As a practical matter, the fact that “Type F” licenses are set to expire in a time coordinated with the individual’s legal right to remain in the country as a non-citizen, it seems clear that these naturalized citizens will be required to update their MVD records in due time, regardless of whether they do so in order to register to vote. *See* SSER at 235A, 01-10-08 Deposition of A. Yanofsky at 30:15-18.

¹⁰¹ ER 3, CR 1040 at 31.

to Plaintiffs' assertions, the County Recorders do not interpret the possession of a "Type F" license to automatically indicate ineligibility to vote.¹⁰² The County officials testified consistently that a "Type F" license meant only that the applicant would have to provide alternative proof of citizenship.¹⁰³

The laws implemented after Proposition 200 are not facially discriminatory and there is no evidence of invidious discrimination in their application. In fact, the options afforded citizens for establishing their voter qualifications are extremely broad and provide each individual the opportunity to provide documentation that is appropriate to his circumstances. The District Court's ruling that Plaintiffs failed to establish a violation of the Equal Protection Clause should be upheld.

III. PROPOSITION 200 DOES NOT VIOLATE SECTION 2 OF THE VOTING RIGHTS ACT.

The District Court correctly found that Latinos have not been shown to have been disparately impacted in either voter registration or in person polling place voting.¹⁰⁴ In order to prevail on their Voting Rights Act claim, Plaintiffs were required to establish by other than anecdotal references that Proposition 200, as enacted and applied, actually results in a wholesale discrimination on the basis of

¹⁰² CSER at 87-89, 01-16-08 Deposition of L. Dean-Lytle at 81:13-83:5; CSER at 109, 01-22-08 Deposition of F. A. Rodriguez at 172:8-16.

¹⁰³ *Id.*

¹⁰⁴ ER 3, CR 1040 at 41-42, 47.

race. Proposition 200, however, is applied evenly and equally to every individual attempting to register or vote at the polls in Arizona and does not deny or abridge any Plaintiff's "right to vote on account of race." *Farrakhan v. Wash.*, 338 F.3d 1009, 1019 (9th Cir., 2003). While social and historical factors may be considered, Plaintiffs' still must prove that the voting practice is *itself* connected to the prohibited result. *Smith v. Salt River Project Agr. Improvement and Power Dist.*, 109 F.3d 586, 595 (9th Cir., 1997) ("Section 2 plaintiffs must show a causal connection between the challenged voting practice and a prohibited discriminatory result."). The District Court properly found that Plaintiffs did not establish this causal connection.¹⁰⁵

In fact, the District Court indicated that Plaintiffs had not even established a significant disparate impact on Latino registration and voter turn out.¹⁰⁶ Not a single of Plaintiffs' five experts provided credible information to show that Latino citizens have been harmed by the implementation of proof of citizenship at the time of registration. Dr. Espino studied Hispanic voter registration trends and testified that in 2/3 of Arizona's counties, Hispanics are actually **doing better** after Proposition 200 than they were before Proposition 200.¹⁰⁷ While Plaintiffs attempt to minimize or use smoke and mirrors to outright ignore the simple implications of

¹⁰⁵ ER 3, CR 1040 at 46-47.

¹⁰⁶ *Id.* at 41-42.

¹⁰⁷ SSER at 26-30, Trial Transcript at 420:10-424:18

this statistic, they cannot. The fact is clear no matter how they cut it – there has been no disparate impact on Latinos. Similarly, Dr. Lanier’s data shows that Latino and non-Latino voter registrations have actually increased since the passage and enactment of Proposition 200.¹⁰⁸ This is all while Latino *citizen* voting age population has experienced a smaller growth rate than non-Latino citizen voting age population following the implementation of Proposition 200.¹⁰⁹

Similarly, there is no expert testimony in the record that suggests that Latinos have been disparately impacted by the voting identification requirements. As stated above, such a conclusion would be difficult to support because each County offers at least two forms of non-photo ID, free of charge – the Voter Registration Card and a Recorder’s Certificate.¹¹⁰ Many send out official election mail that can be used as non-photo ID as well.¹¹¹ Given these free forms of identification, which are readily available through each County, it is unlikely that anyone could not access appropriate forms of identification with only minimal effort.

While Plaintiffs argue that the District Court misapplied the plain statistics presented to it, it offers no support for the proposition that the District Court

¹⁰⁸ SSER at 135-36, Trial Exhibit 879.

¹⁰⁹ SSER at 2-5, Trial Transcript at 48:22-24; 50:24-51:7; 56:4-14.

¹¹⁰ CSER at 57, 60, 07-31-06 Deposition of K. Osborne at 56:1-15, 111:3-21; CSER at 109, 01-22-08 Deposition of F. A. Rodriguez at 172:17-23; CSER at 85-86, 90-91, 01-16-08 Deposition of L. Dean-Lytle at 41:11-42:3, 85:18-25, 100:9-20.

¹¹¹ SSER at 93, Trial Transcript at 748:22-25.

engaged in an inappropriate inquiry by looking at the overall status of Latinos in Arizona's electorate. Indeed, if, as admitted by Plaintiffs, one of the inquiries under Section 2 is whether the questioned statute has resulted in the dilution of minority voting strength, then the overall status of Latinos in the Arizona electorate is a wholly appropriate inquiry. *See* Plaintiffs' Opening Brief at 48.

Plaintiffs suggest that the District Court should have limited its inquiry to a comparison of the percentage of Latino registrations that were rejected or ultimately not registered versus the percent of non-Latino registrations that were rejected or ultimately not registered. *See* Plaintiffs' Opening Brief at 52. However, this is unquestionably an irrelevant comparison. Even if Plaintiffs had cited to some authority that limited the District Court to analyzing the rejection rate of Latinos vs. non-Latinos, the appropriate comparison would have to be the rejection rate of Latinos who are eligible to register to vote, versus the rejection rate of non-Latinos who are eligible to register to vote. Plaintiffs' experts presented no analysis on whether those who were rejected, or still unregistered at the time of trial, were actually eligible to register to vote. In fact, no evidence was presented on this highly relevant issue at all. As such, Plaintiffs did not present sufficient evidence on which to prevail on their Voting Rights Act claims and the District Court's judgment should be affirmed.

IV. PROPOSITION 200 DOES NOT IMPOSE A POLL TAX.

Plaintiffs' argue that the District Court and, by extension, this Court erred in concluding that "voters do not have to choose between paying a poll tax and providing proof of citizenship when they register to vote. They have only to provide the proof of citizenship." Plaintiff's Opening Brief at 61 (quoting ER 5, CR 330 at 3; *Gonzalez v. Arizona*, 485 F. 3d 1041, 1049 (9th Cir., 2007)). The Twenty-fourth Amendment prohibits denying or abridging the right to vote "by reason of failure to pay any poll tax or other tax." However, Plaintiffs do not argue that the Arizona election law includes an explicit poll tax. Instead, they argue that for those who do not already possess proof of citizenship, it could cost them some money to obtain such proof. These arguments are as unavailing now as they were when they were first made to this Court in 2007. In reality, Gonzalez Plaintiffs have been unable to produce a single person who is without some form of proof of citizenship.¹¹² The County Defendants respectfully request that the Court reject Plaintiffs' arguments for the same reasons that it previously rejected them and uphold the District Court's summary judgment of this claim.

¹¹² Indeed, in the course of the entire trial, only one person was produced who claims not to have proof of citizenship. CSER at 5, Trial Transcript at 87:4-24. Even in that scenario, the complaint was not that it might cost some nominal fee to obtain proof of citizenship, but that she did not have access to the appropriate documents or testimonials to acquire proof of citizenship. *Id.*

CONCLUSION

For the reasons stated above, the Court should affirm the District Court's judgment in favor of Defendants.

Respectfully submitted this 23rd day of March, 2009.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees respectfully advises the Court that, apart from the case with which this appeal was consolidated (No. 08-17115), which case is identified in Appellants' opening brief, Defendants-Appellees are not aware of any related cases pending in the Ninth Circuit.

/s/ Dennis I. Wilenchik

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,048 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 23rd day of March, 2009.

/s/ Dennis I. Wilenchik

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed a copy of the foregoing document by First-Class Mail, postage prepaid, to the following participants on the 23rd day of March, 2009 to:

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I further certify that pursuant to Fed. R. App. P. 25(d) and Rule 4(a)(2) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases (11/10/2008), on the 23rd day of March, 2009, five copies of the Excerpts of Record were sent via Federal Express to:

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